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Lim Liah Wee v Public Prosecutor

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HIGH COURT (MUAR) — CRIMINAL APPEAL NO JB-42S-1–03 OF 2021
AWANG ARMADAJAYA JC
29 APRIL 2021

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Criminal Procedure — Revision — Stay of execution pending appeal — Offence under s 15(1)(a) of Dangerous Drugs Act 1952 — Whether offence under s 15(1)(a) of the Dangerous Drugs Act 1952 punishable under s 39C(1) of the same Act is a bailable offence — Whether bail pending appeal should be applied — Whether court in considering bail may consider only previous convictions or the penalty clause of the current criminal charges — Dangerous Drugs Act 1952 ss 15(1)(a) & 39C(1)

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Evidence — Affidavit — Affidavit in support — Solicitor affirmed affidavit on behalf of litigant — Whether facts to be deposed contentious or disputed — Whether facts within solicitor's personal knowledge — Whether solicitor authorised by litigant to depose affidavit — Whether affidavit admissible

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This was a notice of motion filed by the applicant, amongst others, for: (a) an application for stay of execution of the sentence meted down by the sessions court pending the disposal of the appeal in the High Court; and (b) the appellant be granted bail. The motion was supported by an affidavit in support affirmed by the applicant's solicitor. The applicant was arrested by the police was charged under s 15(1)(a) of the Dangerous Drugs Act 1952. The applicant pleaded guilty to the charge and was convicted and sentenced under s 39C of the same Act, to five years imprisonment and one stroke of the rotan. The applicant averred that he was charged in court without the benefit of advice from a legal practitioner and he pleaded guilty without the privilege of a legal practitioner. The public prosecutor raised preliminary objection against the motion on the grounds that: (i) the affidavit in support must be rejected because it was affirmed by a solicitor and this was improper; (ii) this was a back door to an application for bail and this was contrary to the mode provided for by the court; and (iii) the applicant should first apply for bail pending appeal before the trial court and if denied, appeal to the High Court.

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Held, dismissing notice of motion:

(1) The general rule that an advocate and solicitor is not allowed to affirm an affidavit is rooted in r 28 of the Legal Profession (Practice and Etiquette Rules) 1978. There are, however, exceptions to this rule where: (a) the

facts to be deposed must not be contentious or disputed question of facts; (b) the facts to be deposed must be from the advocate and solicitor's knowledge; and (c) the advocate and solicitor was authorised to depose the affidavit (*Malayan Banking Bhd v Charterefield Corp Sdn Bhd* [2001] 3 MLJ 160). On the facts of the case, as counsel for the applicant had admitted that he had no personal knowledge on what happened when the applicant pleaded guilty, the exemption had not been fulfilled which rendered the affidavit inadmissible (see paras 18, 20, & 23).

(2) Section 57 of the Courts of Judicature Act 1964 provides that an appeal shall not operate as a stay of execution though the court has a discretion to grant a stay. As the grant of a stay was only an exception to the general rule, there must be special or exceptional circumstances before the discretion could be exercised in favour of an applicant. The strenuous invitation by the applicant to grant a stay of execution of the sentence which in essence was granting bail to the applicant was met with a brick wall because s 41B of the Dangerous Drugs Act 1952 makes the offences thereunder as unbailable offence and not a mere non bailable offence (see paras 85 & 89).

[Bahasa Malaysia summary

Ini merupakan notis usul yang difailkan oleh pemohon, antara lain, untuk: (a) satu permohonan penangguhan perlaksanaan hukuman yang diberikan oleh mahkamah sesyen menunggu pelupusan rayuan di Mahkamah Tinggi; dan (b) perayu diberikan jamin. Usul disokong oleh afidavit sokongan yang diikrarkan oleh peguam pemohon. Perayu telah ditahan oleh pihak polis dan dituduh di bawah s 15(1)(a) Akta Dadah Berbahaya 1952. Perayu telah mengaku bersalah terhadap pertuduhan dan disabit dan dihukum di bawah s 39C Akta yang sama, kepada lima tahun penjara dan sebatan. Pemohon menyatakan bahawa dia telah dituduh di mahkamah tanpa seorang peguam dan telah mengaku salah tanpa seorang peguam. Pendakwa raya menimbulkan bantahan awal terhadap usul atas alasan bahawa: (i) afidavit sokongan tidak boleh diterima kerana ianya diikrarkan oleh seorang peguam dan ini adalah tidak teratur; (ii) ini merupakan satu permohonan jalan belakang untuk jamin dan ini bercanggah dengan cara yang diperuntukkan oleh mahkamah; dan (iii) pemohon sepatutnya memohon untuk jamin sementara menunggu rayuan dihadapan mahkamah bicara dan sekiranya ditolak, untuk merayu ke Mahkamah Tinggi.

Diputuskan, mengetepikan notis usul:

(1) Prinsip umum bahawa seorang peguam tidak dibenarkan untuk mengikrarkan afidavit adalah berdasarkan k 28 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Kesopanan) 1978. Namun, wujud pengecualian kepada kaedah ini yang mana: (a) fakta yang dideposkan tidak menimbulkan perbalahan atau soalan fakta yang

dicabar; (b) fakta yang dideposkan harus dari pengetahuan peguam tersebut; dan (c) seorang peguam harus diberikuasa untuk mendeposkan afidavit tersebut (*Malayan Banking Bhd v Charterefield Corp Sdn Bhd* [2001] 3 MLJ 160). Berdasarkan fakta dalam kes ini, sepertimana yang diakui oleh peguam pemohon bahawa dia tiada pengetahuan berkaitan apa yang berlaku semasa pemohon mengaku salah, pegecualian tersebut tidak dipenuhi yang menyebabkan afidavit tersebut tidak boleh diterima (lihat perenggan 18, 20, & 23).

(2) Seksyen 57 Akta Mahkamah Kehakiman 1964 memperuntukkan bahawa satu rayuan tidak akan berfungsi sebagai penggantungan perlaksanaan hukuman walaupun mahkamah mempunyai budi bicara untuk memberikan penggantungan. Atas sebab penggantungan merupakan pengecualian kepada prinsip am, perlu wujud keadaan khas dan luar biasa sebelum budi bicara tersebut boleh dilaksanakan yang memihak kepada pemohon. Jemputan keras oleh pemohon untuk membenarkan penggantungan perlaksanaan hukuman yang mana pada asasnya adalah untuk memberikan jaminan kepada pemohon tidak berjaya kerana s 41B Akta Dadah Berbahaya 1952 membuat kesalahan tersebut sebagai kesalahan di bawahnya sebagai *unbailable* dan bukannya *non-bailable* (lihat perenggan 85 & 89).]

Cases referred to

Che Su binti Daud v PP [1978] 2 MLJ 162 (refd)
Clarkson, Re [1986] VR 583 (refd)
Ganesan v PP [1983] 2 MLJ 369; [1983] 1 CLJ 300; [1983] CLJ Rep 567 (refd)
Giordano v R (1982) 31 SASR 241 (refd)
Goh Beow Yam v Reg [1956] 1 MLJ 251 (refd)
Government of Malaysia & Ors v Loh Wai Kong [1979] 2 MLJ 33; [1979] 1 LNS 22, FC (refd)
Hanson and Anor v The Director of PP (Queensland) [2003] QCA 409 (refd)
Hong Kong Bank Malaysia Bhd v Mohammed Noor Tamliho [2002] 3 CLJ 139, HC (refd)
KWK (a child) v PP [2003] 4 MLJ 479; [2003] 4 CLJ 51, CA (refd)
Kwan Wah Yip & Anor, Re [1954] 1 MLJ 146b; [1954] 1 LNS 78 (refd)
Lee Kam Sun v Ho Sau Lin & Anor [1999] 4 MLJ 509; [1999] 4 CLJ 507, HC (refd)
Loy Chin Hei v PP [1982] 1 MLJ 31; [1981] CLJ Rep 178 (folld)
Malayan Banking Bhd v Charterefield Corp Sdn Bhd [2001] 3 MLJ 160; [2001] 6 CLJ 407, HC (refd)
Manickam & Ors v PP [1982] 1 MLJ 227; [1982] CLJ 162; [1982] CLJ Rep 552 (refd)
Munawar Ahmad Anees v PP [2009] 2 MLJ 1; [2009] 2 CLJ 42, FC (refd)
PP v Chew Siew Luan [1982] 2 MLJ 119; [1982] CLJ Rep 285, FC (refd)

PP v Dato' Seri Anwar bin Ibrahim [1998] 4 MLJ 481; [1998] 4 CLJ 387; [1998] 4 AMR 3878, HC (refd)
PP v Dato' Mat [1991] 2 MLJ 186; [1991] 1 CLJ Rep 385, SC (refd)
PP v Kamal Hisham bin Ja'afar [2015] MLJU 1209; [2016] 1 CLJ 303, HC (refd)
PP v Leong Ying Ming [1993] 1 MLJ 177; [1993] 2 CLJ 143, SC (refd)
PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685; [2005] 2 AMR 353, FC (refd)
PP v Wee Swee Siang [1948] 1 MLJ 114 (refd)
PP v Zulkifflee bin Hassan [1990] 2 MLJ 215; [1990] 1 CLJ Rep 249, SC (refd)
Quah Poh Keat & Ors v Ranjit Singh a/l Taram Singh [2009] 4 MLJ 293; [2009] 4 CLJ 316, CA (refd)
R v Farinacci [1993] WCBJ LEXIS 11345, CA (refd)
Ralph v PP [1972] 1 MLJ 242 (refd)
Sharma Kumari a/p Oam Parkash v PP [2000] 6 MLJ 847; [2000] 1 LNS 123, HC (refd)
Sivananthan a/l Jaganathan v Teh Yee Fun & Anor [2003] 4 MLJ 199; [2003] 4 CLJ 551; [2003] 3 AMR 584, HC (refd)
State v P Sugathan 1988 CriLJ 1036, HC (refd)
The Queen v Lee Hoi Kwong [1993] HKCU 402, CA (refd)
Wee Choo Keong v Pendakwa Raya [1990] 2 MLJ 239; [1990] 1 CLJ 1015, HC (refd)
Wong Leh Yin v PP [2007] 8 CLJ 438, HC (refd)
Yusof bin Mohamed v PP [1995] 3 MLJ 66, HC (refd)

Legislation referred to

Companies Act 1965
Courts of Judicature Act 1964 s 57
Criminal Procedure Code ss 2, 3, 323, 325, 387, 388, 389, 418A, First Schedule
Criminal Procedure Code [IN] ss 496, 497, 498
Dangerous Drugs Act 1952 ss 15(1)(a), 39A(2), 39C, 39C(1), 41B, 41B(1), (2), 177A
Federal Constitution arts 5(1), 7(1)
Legal Profession (Practice and Etiquette) Rules 1978 r 28, 28(a)
Penal Code ss 109, 364, 409
Rules of Court 2012 O 41 r 5

Mohd Ismail bin Mohamed (Ismail Khoo & Assoc) for the applicant.
Mustaqim bin Sukarno (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Awang Armadajaya JC:

INTRODUCTION

[1] This is a notice of motion filed by the applicant for the following reliefs:

(a) application for stay of execution of the sentence meted down by the Sessions Court, Muar in the Case No JB-62D-10–03 of 2021 pending the disposal of the appeal in the High Court;

(b) appellant be granted bail; and

(c) any other orders deems fit and just by the court.

[2] The motion is supported by an affidavit in support affirmed by the applicant's solicitor Mr Mohd Ismail bin Mohamed.

[3] The cause papers are as follows:

(a) notice of appeal (encl 1);

(b) notice of motion (encl 4); and

(c) affidavit in support by the applicant's solicitor (encl 5).

BRIEF FACTS

[4] On 6 March 2021, the applicant was arrested by the Police and the next day, he was charged at the instance of the public prosecutor under s 15(1)(a) of the Dangerous Drugs Act 1952 and pleaded guilty to the charge and was convicted and sentenced under s 39C of the same Act, to five years imprisonment and one stroke of the rottan.

[5] The applicant was said to have filed a notice of appeal against both conviction and sentence.

[6] The applicant's solicitor averred that the applicant was charged in court without the benefit of advice from a legal practitioner and he pleaded guilty without the privilege of a legal practitioner.

[7] No grounds was advanced on why the application for a stay of execution should be granted, and why the application is not done by way of a bail application.

A PRELIMINARY OBJECTION

[8] The public prosecutor raised a preliminary objection against this motion on the following grounds:

B (a) the affidavit was affirmed by a solicitor and this is improper. Hence the affidavit in support must be rejected;

(b) this is a back door to an application for bail. It is contrary to the mode provided for by the court; and

C (c) the applicant should first apply for bail pending appeal before the trial court and if denied, appealed to the High Court.

[9] I informed parties that I shall hear both the preliminary objection raised and the application proper and shall decide both together so as to save time.

D

[10] On preliminary objection, I shall deal with them first.

[11] Rule 28 of the Legal Profession (Practice and Etiquette) Rules 1978 E stipulates as follows:

28 Advocate and solicitor not to appear in a case where he is a witness

(a) An advocate and solicitor shall not appear in Court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it F becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.

(b) An advocate and solicitor shall not appear before an appellate tribunal if in the case under appeal he has been a witness on a material and disputed question of fact in the Court below. G

(c) *This rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts in matters in which he acts or appears.*

H **[12]** In *Lee Kam Sun v Ho Sau Lin & Anor* [1999] 4 MLJ 509; [1999] 4 CLJ 507, the court allowed the preliminary objection that the firm of Messrs Cheah Teh & Su should be disqualified from acting for the plaintiff in the civil action as they were the solicitors for the plaintiff in drawing up of the agreement and were involved in the transaction. His Lordship, Justice James Foong (as he then I was) held at pp 513–514 (MLJ):

It is a well-established principle that lawyers should not act as counsel and witnesses in the same proceedings. The reason, as expounded by Beaumont CJ in *Emperor v Dadu Ramu* 1939 AIR Bom 150, is: *'An advocate cannot cross-examine himself, nor can he usefully address the Court as to the credibility of his own testimony, and a court*

may feel that justice will not be done if the advocate continues to appear'. This rule is expressly accepted by the Federal Court in Wong Sin Chong & Anor v Bhagwan Singh & Anor [1993] 3 MLJ 679 at 678; [1993] 4 CLJ 345; [1993] 2 AMR 3351.

[13] The first principle relating to r 28 of the Legal Profession (Practice and Etiquette) Rules 1978 that was laid down by His Lordship Justice Wan Yahya in *Wee Choo Keong v Pendakwa Raya* [1990] 2 MLJ 239; [1990] 1 CLJ 1015, whereby His Lordship decided it was never the intention of r 28 of the Legal Profession (Practice and Etiquette) Rules 1978 that an advocate and solicitor automatically must be precluded as a solicitor as soon as he becomes aware that he would be a potential witness. His Lordship's remarks were as follows:

(1) *Rule 28 of the Legal Profession (Practice and Etiquette) Rules 1978 does not envisage that an advocate and solicitor is ipso facto excluded from appearing as such in Court, the moment he believes that he will be a witness. That ethical restriction will only arise if he is likely to be a witness of any material or disputed fact. Rule 28 is a rule of ethics and the magistrate should not have applied it totally with the stringency of the force of law.*

(2) The only matter which appears to be in conflict with the petitioner's presence is the allegation that he and not the deceased's son wrote the police report. The problem could be fairly solved by confining the magistrate's order only to that stage of the proceeding if and when the deceased's son is about to give evidence.

[14] *Wee Choo Keong* was followed by His Lordship Justice Ramli Ali) in *Hong Kong Bank Malaysia Bhd v Mohammed Noor Tamliho* [2002] 3 CLJ 139.

[15] The second and most crucial principle pertaining to r 28 that was laid down by the Court of Appeal in *Quah Poh Keat & Ors v Ranjit Singh a/l Taram Singh* [2009] 4 MLJ 293; [2009] 4 CLJ 316. That was when the Court of Appeal agreed with the High Court to invoke r 28(a) to disqualify the legal firm Messrs Lee Hishamuddin (the firm of which both Lim Heng Seng and Dato' Naban served as partners) to avoid the embarrassment during trial and to 'eliminate any possible conflict of interest surfacing on the solicitors' part and simultaneously ensured that the interests of the contesting parties were not compromised'.

[16] His Lordship Justice Suriyadi Halim Omar (speaking for the Court of Appeal) in delivering the judgment of the Court of Appeal said the following:

It would be unlikely that Datuk Naban would suggest to the respondent to 'pack his bags and go' if the conclusion of the meeting had not been consonant with his or the firm's legal views. If he had held a differing view, it was more than likely that the unpleasant duty of transmitting the bad news would have fallen on a KPMG official or some other person. By all accounts, this finding of guilt of the respondent of gross misconduct, followed by the instruction to 'pack his bags and go', were material issues as there was total denial of the charges by the respondent. With the demands of r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 having been completely complied with, in particular the

existence of the statutory requirements of material or disputed facts, any reasonable man armed with those facts would anticipate the calling of those two solicitors as witnesses. Thus, the High Court judge's ruling had eliminated any possible conflict of interest surfacing on the solicitors' part and simultaneously ensured that the interests of the contesting parties were not compromised.

[17] To address this issue, the starting point is O 41 r 5 of the Rules of Court 2012:

> Order 41 — Affidavits
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> Rule 5 — Contents of affidavit (O 41 r 5)
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> (1) Subject to *Order 14, rules 2(2) and 4(2)*, to paragraph (2) of this rule and to any order made under *Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove*.
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information of belief with the sources and grounds hereof.

[18] The general rule that an advocate and solicitor is not allowed to affirm an affidavit is rooted in r 28 of the Legal Profession (Practice and Etiquette Rules) 1978. This general rule stem from the fact that any deponent of affidavits may be cross-examined by the adversary (subject to leave of court).

[19] There are, however, exceptions to this rule. In the case of *Malayan Banking Bhd v Charterefield Corp Sdn Bhd* [2001] 3 MLJ 160; [2001] 6 CLJ 407 (which was subsequently adopted by His Lordship Justice RK Nathan in *Sivananthan a/l Jaganathan v Teh Yee Fun & Anor* [2003] 4 MLJ 199; [2003] 4 CLJ 551; [2003] 3 AMR 584) His Lordship, judicial commissioner Ramly Ali (as he then was) in the following paragraphs, summed up the situation where an advocate and solicitor is allowed to depose an affidavit on behalf of the litigant:

> ... I am of the view that a solicitor may depose an affidavit on behalf of the litigant if all the following conditions are fulfilled:
>
> i) *the facts to be deposed must not be contentious or disputed question of facts;*
>
> ii) *the facts to be deposed must be from his knowledge (if the affidavit is for the purpose of being used in interlocutory proceedings, it may contain statements of information or belief with sources and grounds thereof); and*
>
> iii) he is authorised to depose the affidavit by the litigant.

[20] In the course of the submission, the learned counsel for the applicant admitted that he has no personal knowledge on what happened on 7 April 2021 when the applicant pleaded guilty. In fact these were narrated to him by family members of the applicant whom he did not named.

[21] He offered no reason on why those family members (if indeed the averments were true) could not affirm any affidavit themselves. Further it is unclear why the applicant whom the learned counsel could get in touch was not requested to affirm an affidavit that would render support on the application.

[22] It is clear that O 41 r 5 stipulates:

> (1) Subject to *Order 14, rules 2(2) and 4(2)*, to paragraph (2) of this rule and to any order made under *Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.*
>
> (2) *An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information of belief with the sources and grounds hereof.*

[23] This has not been fulfilled and it render the affidavit inadmissible.

[24] On this ground alone, this preliminary objection should be upheld.

[25] But because this concerns a matter so fundamental such as the liberty of a person, I am willing to bend backwards to accommodate the applicant.

[26] It must not be taken as a general rule but only on this case alone.

[27] The general rule remains that the affidavit by a solicitor affirmed on behalf of the client is inadmissible and hence should be rejected. The facts of this case does not fall within any of the exceptions to that rule.

THE ISSUES IN THIS APPLICATION

[28] The learned counsel for the applicant informed the court that the applicant was arrested on 6 March 2021 and after the investigation was completed, he was charged in the magistrates court. This, according to the learned counsel, the applicant did not have the wise counsel of a legal practitioner. Further the applicant was unable to see relatives before the case and he pleaded guilty and was sentenced accordingly.

[29] Since the essence of this notion guised as a stay of execution of the sentence meted by the learned sessions court judge, is in pith and substance, an application for bail pending appeal and I shall deal with it as such.

[30] The learned counsel for the applicant submitted that this court has the jurisdiction and discretion to grant bail. Further, since the applicant is from Muar and work in Muar, he is willing to accept any condition imposed by this

court including reporting himself to the Police Station every month, have sufficient number of surety(s) and any reasonable conditions that the court deems fit.

[31] The learned counsel further submitted that s 39C of the Dangerous Drugs Act 1952 is wrongly applied. The plea of guilty was defective as the applicant had no legal advice before pleading guilty to the charge.

[32] There are four main issues:

(a) whether an offence under s 15(1)(a) of the Dangerous Drugs Act 1952 punishable under s 39C(1) of the same Act is a bailable offence;

(b) whether bail is a right under art 5(1) of the Federal Constitution;

(c) whether art 7(1) is applicable in this application; and

(d) whether the court in considering bail for an accused person may consider only previous convictions or the penalty clause of the current criminal charges.

[33] I shall deal with the issues accordingly.

[34] 'Bail' is defined in the *Cambridge English Dictionary* (Cambridge University Press 2020) as 'an amount of money that a person who has been accused of a crime pays to a law Court so that they can be released until their trial. The payment is a way of making certain that the person will return to Court for trial'.

[35] Under s 389 of the Criminal Procedure Code which reads:

> The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case *as being sufficient to secure the attendance of the person arrested, but shall not* be excessive; *and a judge* may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Court be reduced or increased.

[36] The purpose is bail is to ensure that a person will attend proceedings in court for the trial of his case until its final conclusion without fail. If there is a surety (or a bailor as he is known in some jurisdictions), the burden is on the surety to ensure the attendance of the accused person throughout the duration of the trial and if convicted, may be extended to ensure that the ends of justice are met.

[37] Once the surety understands his duty and is willing to offer himself to the court as one, he is duty bound to ensure the attendance of the accused

person. His failure to ensure the attendance of the accused person does not only make himself liable for legal proceedings against himself and/or the amount of money (either in cash or in its equivalent value in property accepted by court) is liable to be forfeited.

[38] If the surety finds the behaviour of the accused person erratic and is beyond his control, he may apply to court to have his place as surety be replaced by another who is acceptable to the court or the accused person left without a surety must execute a personal bond (if the court allows) or be remanded until the disposal of his case.

[39] Under s 2 of the Criminal Procedure Code, it is defined 'bailable offence' means an offence shown as *bailable* in *the First Schedule or which is made bailable by any other law for the time being in force* and 'non-bailable offence' means *any other offence.*

[40] The First Schedule, Criminal Procedure Code provides for offences under the Penal Code. It also defines offences outside the Penal Code.

[41] For offences that are punishable with death, or imprisonment for seven years, these are non-bailable offence.

[42] For offences that are punishable with imprisonment for three years and upwards, but less than seven years, these are non-bailable offences.

[43] For offences that are punishable with imprisonment for less than three years, these are bailable offences.

[44] For offences that are punishable with a fine only, these are bailable offences.

[45] In *Public Prosecutor v Kamal Hisham bin Ja'afar* [2015] MLJU 1209; [2016] 1 CLJ 303, the respondent, who was faced with charges under the Penal Code and the Companies Act 1965, was released on bail pursuant to two orders made by two sessions court judges ('SCJ'). The learned High Court judge in the instant case invoked revisionary power on his own motion pursuant to ss 323 and 325 of the Criminal Procedure Code ('the CPC') to call for and examine the record of the proceedings before the sessions court for the purpose of satisfying as to the correctness, legality or propriety of any finding, sentence, order recorded or passed and as to the regularity of any proceedings before the sessions court. It was the contention of the respondent, inter alia, that: (i) both the SCJ were correct and right in granting him bail based on the terms and conditions set therein; (ii) the fear that he might abscond and leave

the jurisdiction of the court was without legal basis and unfounded; (iii) the police reports against him for leaving Malaysia were made after he had left the country; (iv) he should not be remanded due to his health problems; and (iv) his father was seriously ill and he needed to be at his bedside. His Lordship, Justice Dato Indera Mohd Sofian explained:

> [22] The uncontroverted facts of the instant case is that all the charges against the respondent are non-bailable offences. Before embarking on the merits of the case it is perhaps convenient to advert to the law relating to bail. This area of the law is governed by ss 387, 388 and 389 of the CPC. Section 387 deals with bailable offence. Bailable offence means an offence shown as bailable in the First Schedule to the CPC or which is made bailable by any other law for the time being in force. Column 5 of the First Schedule of the CPC prescribes which Penal Code offences are bailable and which are non-bailable. For offences against laws other than the Penal Code, the First Schedule provides that any such offences punishable with imprisonment for less than three years or with a fine only shall be bailable. Where an accused is charged with a bailable offence he is entitled to be released on bail as a matter of right (see *Public Prosecutor v Dato' Mat Safuan* [1991] 2 MLJ 186; [1991] 2 CLJ 1112; [1991] 1 CLJ Rep 385). There is no provision in the CPC which allows bail to be revoked or cancelled in the case of bailable offence under s 387 of CPC.
>
> [23] Section 388 of CPC deals with non-bailable offence where in this case the granting of bail is at the discretion of the Court, (see *Lim Kiap Khee v Public Prosecutor* [1988] 1 MLJ 198; [1987] 2 CLJ 442; [1987] CLJ Rep 717). Any person charged with committing a non-bailable offence, is not entitled to bail as of right. The exercise of discretion must be judiciously and depends on the gravity of the offence. Column 5 of the First Schedule of the CPC stipulates that non-bailable offence is where the punishment is death or imprisonment for seven years or more or for three years or more but less than seven years.

[46] Mr Mallick in his book *Bail: Law and Practice* (2nd Ed) at p 193:

> But the fact that the accused is presumed to be innocent till the guilt is proved against him beyond all reasonable doubt is not a relevant consideration for grant of bail. Pre-trial detention in itself is not an evil, nor opposed to the basic presumption of innocence.

[47] Justice CS Nair in the case of *State v P Sugathan* 1988 CriLJ 1036 where he states that:

> In some quarters, a feeling seems to exist that the object of criminal law is to protect the rights of the accused and that the criminal justice system is envisioned as a sentinel of the rights of the accused. It is not so. *The law is the sentinel of rights, of the society and of the individual. The rights of the criminal defendant will be as zealously guarded, as the cause of public justice. Pre-trial detention in itself is not an evil, nor opposed to the basic presumption of innocence.* Pronouncements of the Supreme Court have recognised the importance of effective investigation, as much as the rights of the accused.

[48] In the case of *Public Prosecutor v Wee Swee Siang* [1948] 1 MLJ 114 where His Lordship Justice Callow in refusing the accused's application for bail cited with approval nine of the 12 factors His Lordship had considered. These factors are not exhaustive and factors such as age, sex and state of health of the accused are relevant factors to be considered.

[49] The 12 factors His Lordship had considered when refusing the application for bail were as follows:

(a) the nature and the gravity of the offence charged;

(b) the nature of the evidence in support of the charge;

(c) whether there was or was not reasonable ground for believing the accused guilty of the offence;

(d) the severity and degree of punishment which conviction might entail;

(e) the guarantee that the accused, if released on bail, will not either abscond or obstruct the prosecution in any way;

(f) the danger of the offence being committed or repeated;

(g) the danger of the witnesses being tampered with;

(h) whether the accused, if released on bail, is likely to tamper with the prosecution evidence;

(i) whether the accused is likely to get up false evidence in support of the defence;

(j) the opportunity of the accused to prepare the defence;

(k) character, means and standing of the accused; and

(l) the long period of detention of the accused and probability of further period of delay.

[50] In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim* [1998] 4 MLJ 481; [1998] 4 CLJ 387; [1998] 4 AMR 3878 where it was not shown by any material on record to the court that the accused was not receiving any medical treatment while in *detention and neither did counsel said that the accused was not receiving the required treatment.*

[51] In *Manickam & Ors v Public Prosecutor* [1982] 1 MLJ 227; [1982] CLJ 162; [1982] CLJ Rep 552 the High Court ruled:

> *In cases where there appear reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life, because of the seriousness of the offence charged no bail should be granted, unless the accused satisfies the High Court that there are exceptional and special grounds justifying the granting of bail.*

In such an event, the burden is on the accused.

In other cases of lesser charges, bail should, in my opinion, normally be granted as a matter of course, unless the prosecution can satisfy the Court that in the interest justice bail should not be granted. In all cases (whether bailable or not bailable) the High Court has the discretion to grant bail under ss 388 and 389 of the Criminal Procedure Code, but, as has often been said, that discretion must always be exercised judicially.

[52] In *Wong Leh Yin v Public Prosecutor* [2007] 8 CLJ 438, The applicant was arrested and upon the expiry of the remand tentatively charged before the magistrate's court for an offence under s 364 read with s 109 of the Penal Code. The application to admit the applicant to bail pending the requisite consent to prosecute was made under ss 388 and 389 of the Criminal Procedure Code. The deputy public prosecutor, in opposing the application, filed an affidavit affirmed by a police officer holding the rank of Inspector who was also the investigating officer in this case which contained reasonable grounds for believing that the applicant had been guilty of abetment in the commission of the offence of abduction. The applicant, however, argued that on the effect of s 177A of the Criminal Procedure Code ('the CPC') to the instant application where the requisite consent of the public prosecutor had not been obtained, s 388 did not apply because the applicant could not be said to have been charged with any offence. It followed therefore that s 387 of the CPC applied and the applicant was entitled to bail as of right. The High Court held that:

[2] *The offence is by virtue of s 109 of the Penal Code punishable by death or imprisonment for a term, which may extend to twenty years plus whipping. The construction of s 364 of the Penal Code was such that the death penalty is the first option of punishment for an offender* (see *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14; [1998] 3 CLJ 769*). It is common ground that the offence is non-bailable and unarguably a very serious one. Hence, the application to admit the applicant to bail pending the requisite consent to prosecute is made under ss 388 and 389 of the Criminal Procedure Code. The statement of the law on this is set out in the judgment of Gunn Chit Tuan J in Che Su binti Daud v Public Prosecutor* [1978] 2 MLJ 162; [1978] 1 LNS 23, *an authority which has withstood the test of time*:

> *Though a judge has under ss 388 and 389 of the Criminal Procedure Code (FMS Cap 6) absolute discretion in granting bail, that discretion must be exercised judicially and he should not (except for exceptional and very special reasons) grant bail if there appears reasonable grounds for believing that the accused has been guilty of an offence punishable with death or life imprisonment … What constitutes exceptional and special reasons must necessarily depend on the facts of each case … (at p 162)*

[3] At this early stage the prosecution is neither expected nor required to adduce evidence sufficient to satisfy the standard of proof required to establish the guilt of the applicant at the trial. All that is needed, in my view, is some evidence that supports a finding consistent with the operative words of subsection (1) of s 388 of

the Penal Code which are these; '... if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life'.

[53] In *Public Prosecutor v Dato' Mat* [1991] 2 MLJ 186; [1991] 1 CLJ Rep 385, the respondent M was charged under s 409 of the Penal Code, a non-bailable offence. The sessions court had allowed M's release on the condition that he enter into a bail bond in the sum of RM400,000 in two sureties and surrender his international passport. The case was subsequently transferred to the High Court under s 418A of the Criminal Procedure Code. M's application for the release of his international passport so that he could make an overseas trip was granted by the High Court. The prosecution appeals, arguing that the implied power to impose conditions for the surrender of M's passport under s 388 of the CPC is not variable by the High Court either under s 389 of the CPC or in the exercise of its inherent power; the only means was by way of an appeal under s 394 of the CPC. Further, the appellants contend that if there is a discretion, it must be confined to the variation on the amount and not the condition of the bail such as the temporary release of the passport.

[54] The Supreme Court ruled, inter alia:

The law relating to bail is set out in Chapter XXXV of the Criminal Procedure Code. Section 387 sets out the right of an accused or arrested person to bail in bailable offence. *Section 388 provides for the circumstances where a police officer or the Court may exercise its discretion to release on bail any person accused of a non bailable offence. Both sections do not have any specific provision for the imposition of conditions. However, Indian authorities seem to favour the view that when discretion is given to the Court to refuse or grant bail, that discretion in itself implies a discretion to grant bail subject to certain conditions. But, when there is no discretion to refuse bail, the question of imposing conditions does not arise — Rex v Genda Singh & Ors* [1950] All ER 525. Thus conditions can be included in a bail bond issued pursuant to s 388 but not to s 387 as the latter section gives no discretion to the officer or Court to withhold bail when the person arrested is prepared to provide such bail. Similarly in *Hazari Lal Gupta v Rameshwar Prasad & Anor* AIR [1972] SC 484 *it was held that the High Court while granting bail can lay down a condition restricting the accused person's departure from India by requiring him to surrender his passport. Several earlier Indian authorities had expressed the same view on this matter. In Varadaraja Mavaluar* [1957] 1 MadLJ (Cri) 717*, the Madras High Court reviewing the case law on this subject held that in non bailable offences the court can impose restriction in suitable cases. In Re Kota Appalakonda* [AIR 1942 Mad 740] *the court in holding that condition made under s 496 of the Indian Cr PC to be invalid made the following observation on the scope of s 497:*

> *With regard to non-bailable offences, I can see no objection to imposing conditions of this kind; for the Magistrate has an option to grant bail or to refuse bail and he has also the power under s 497(5) of the Criminal Procedure Code of causing persons so released to be arrested and committed to custody, which subsection he would apply in case the condition was not fulfilled.*

[55] The provisions of ss 496, 497 and 498 of the former Indian Criminal Procedure Code correspond with ss 387, 388 and 389 respectively of our Criminal Procedure Code and for the same reasons as expressed in the aforementioned case, we would agree that analogous fair and reasonable conditions apropos to the securing of the accused's subsequent attendance in court are not illegal and therefore imposable by our courts.

[56] In fact although no ruling was made in Federal Court's decision in *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33; [1979] 1 LNS 22 and the Supreme Court's decision in *Public Prosecutor v Zulkifflee bin Hassan* [1990] 2 MLJ 215; [1990] 1 CLJ Rep 249 the facts in both cases clearly indicate that the condition for the surrender of passport was not disapproved of by the court:

> Having decided on the legality to impose the condition and in particular the condition requiring the accused to surrender his passport, we next proceed to consider the question whether the Subordinate and the High Court has the power to alter or remove it. Section 388(5) of the Criminal Procedure Code empowers the Court which granted the bail the power to cancel it. The power to admit, refuse or cancel bail must necessarily imply the power to vary or alter the same. In the present case in view of the order made for its transfer from the sessions court to the High Court, the learned judge was acting well within his jurisdiction to review the condition of bail as if the same was made by him.
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> Section 389 of the Criminal Procedure Code which is relevant to this issue reads:
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> > *The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested, but shall not be excessive; and a Judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Court be reduced or increased.*
>
> *This section is intended to supplement the provision on s 388. The first part of the section contains a directive to the police officer or the Court before which the accused is produced in the first instance, that the amount of bail should be reasonably sufficient to secure the attendance of the person arrested and this amount should not be excessive. The second part confers on the Judge (i) the power to direct in any case, whether there be an appeal or not on conviction, that any person be admitted to bail and (ii) the power to direct that the bail required by a police officer or the Court be reduced or increased,* In *Hidayatullah v The Crown* 50 Cr LJ 1949 the full bench of the Lahore High Court opined that the use of the expression, *'The High Court, may in any case, direct that any person be admitted to bail' clearly shows that s 498 (corresponding to our s 389) is intended to supplement and complete the provision of s 497 (our s 388) and 498 (our s 389) and justifies the belief that the power given includes a power to revise the exercise of discretion by police officer and court of first instance.*
>
> We agree with the above authorities and we would reiterate what was said earlier in *Public Prosecutor v Zulkifflee bin Hassan* that the High Court has an unfettered judicious discretion in dealing with an application under s 389.

The appellant now contends that such discretion must be confined to the variation on the amount and not the condition of the bail such as the temporary release of the passport.

As discussed earlier there is no express authority in our Criminal Procedure Code providing for conditions to be included in any bail. The practice to do so however had gained judicial recognition in both courts in India and Malaysia on the rationale that such condition would provide an adjunctive or supplemental security towards ensuring the attendance of the arrested person at his subsequent trial. No person can be admitted to bail under ss 388 or 389 purely on his undertaking to abide by some conditions alone without binding himself to forfeit a certain sum in the event of his default, but a person may be released on a bail without any condition attached to it. Such condition therefore, to our mind, is not the principal but only a complementary security to be applied concomitantly with the amount prescribed in the bail bond. Such condition in the bail bond would have a persuasive effect of reducing a larger amount of bail which would have been otherwise required by the court. To put it in another way — a court may require a certain large amount to be deposited in respect of a non bailable offence but would be willing to reduce it to a lesser sum on the undertaking of the detained person to surrender his passport.

The amount of money in the bail bond and not the condition form the prerequisite to the release of an arrested person on bail. Therefore s 388 makes no mention of any condition, and it follows that such a provision does not appear in s 389. The reason is obvious — the legislature could not have made a provision for the alteration or variation of something which it did not create or was not at that time in existence.

[57] The offence for which the applicant was charged with and convicted of, is one under the Dangerous Drugs Act 1952 and there is a specific provision dealing with such an application namely s 41B.

[58] Section 41B of the Dangerous Drugs Act 1952 stipulates:

41B No bail to be granted in respect of certain offences

(1) *Bail shall not be granted to an accused person charged with an offence under this Act —*

(a) *where the offence is punishable with death; or*

(b) *where the offence is punishable with imprisonment for more than five years; or*

(c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.

(2) *Subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.*

[59] There are two points that must be emphasised which are:

A (a) bail shall not be granted to an accused person charged with an offence under this Act, where the offence is punishable with imprisonment for more than five years; and

(b) sub-s (1) to s 41B shall have effect notwithstanding any other written law or any rule of law to the contrary.

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[60] Subsection (2) is the operational form of the maxim *generalia specialibus non derogant.*

C **[61]** In *Public Prosecutor v Leong Ying Ming* [1993] 1 MLJ 177; [1993] 2 CLJ 143, The respondent was charged for an offence under s 39A(2) of the Dangerous Drugs Act 1952 ('the Act'). The respondent applied for bail which was refused by the sessions court judge, he being of the view that the offence was not bailable under s 41B of the Act. The respondent made an application D for bail to the Kuantan High Court pursuant to s 389 of the Criminal Procedure Code and the learned judge allowed his application and granted bail. The public prosecutor appealed. The Supreme Court held that,

> We have perused the notes of proceedings recorded in the Court below and note E that unfortunately the Federal Court case of *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ Rep 285; [1982] CLJ 354 was *not brought to the learned Judge's attention. Otherwise he would have been aware of the judgment in that case. In any case, we are of the view that the words used in s 41B(1)(b) are clear and that the words 'punishable with imprisonment for more than five years' mean imprisonment from five years and one day upwards up to imprisonment for life. Then,* F *when we turn to s 39A(2), we consider that the words 'be punished with imprisonment for life or for a term which shall not be less than five years' are also clear and unequivocal and mean that the offence is punishable with imprisonment for more than five years, ie five years and one day up to a maximum of imprisonment for life.*
>
> *That being so, an offence under s 39A(2) of the Act clearly comes within the ban imposed* G *by s 41B(1)(b) of the Act and therefore no bail can be granted in respect of such an offence. It follows that in this case the offence for which the respondent was charged was not bailable under the specific provisions of the Act and that the learned judge should not have granted bail in this case.*

H **[62]** In the classical case of *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ Rep 285, where His Lordship, Chief Justice (Malaya) Raja Azlan Shah (as His Majesty then was) had to decide whether a pregnant woman charged for trafficking in drugs could and should be granted bail. This is what His Lordship said at p 119:

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> *In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that s 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act, 1978 (Act A426) and became operative on 10 March 1978. Generalibus specialia derogant is a cardinal principle of interpretation.*

It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law.

[63] And at p 120, His Lordship had this to say:

The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must ex necessitate yield to the specific provisions of s 41B of the Dangerous Drugs Act in that regard.

[64] His Lordship Justice Wan Yahya in *Loy Chin Hei v Public Prosecutor* [1982] 1 MLJ 31; [1981] CLJ Rep 178 discussed s 41B of the Dangerous Drugs Act 1952. The accused was refused bail by the Sessions Court judge and he applied to the High Court for bail pending the disposal of the charge against him. The issues before the court were: (1) whether s 41 of the Dangerous Drug Act would make the offence non-bailable; and (2) whether the High Court was precluded from exercising its discretionary powers over bail.

At the commencement of hearing before this Court his counsel, Mr Hilary DCruz, with his usual precision, laid down two points for consideration of appeal, as follows:

(i) Whether s 41B of the Dangerous Drugs Act would make the offence non-bailable or preclude bail; and

(ii) In either of these two events whether the High Court is precluded from exercising its discretionary powers over bail.

Counsel first drew the subtle distinction between a non-bailable offence and an unbailable offence. He contends that non-bailable offences, as defined under 'bailable offence' in s 2 of the Criminal Procedure Code include all offences, including those outside the Code, should be either bailable or unbailable offences. Following this reasoning, counsel argued, the offence under s 6B(1)(a) of the Dangerous Drugs Ordinance would therefore fall under 'non-bailable offence'.

It is of particular interest to note that, although the Criminal Procedure Code makes a specific definition of 'bailable offence' the draftsman deliberately avoided the use of that term in s 387 of the Code and instead employs the words 'person other than a person accused of a non-bailable offence' as those entitled to be released in bail. It would seem that the intention of the legislature is not only to confine this right to bail to bailable cases of the Penal Code only but to extend it to offences against other statutes as well. *This, at first sight, may lend some support to counsel's argument. I accept the view that where any statutory offence other than the Penal Code is silent or makes no provision as to bail, then the First Schedule to the Criminal Procedure Code will apply and the offences can be classified either as bailable or non-bailable according to the provisions of the Schedule. However, the provisions only apply to cases where the particular statute creating the offence is silent on the question of bail.*

In my view, if provision is made in a later legislation, then the later provision will prevail over the provisions of the Criminal Procedure Code. The Code is not enacted with the

absolute purpose of laying down a singularly mandatory procedure for all criminal offences but is intended for application to offences in which no provision for procedure is laid down. This intention is clear from s. 3 of the Criminal Procedure Code, which reads:

All offence under the Penal Code shall be required into the tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into the tried according to the same provisions; *subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences.*

A non-bailable offence is no doubt an offence in respect of which the accused may be refused bail, but it is not an absolutely unbailable offence because the Court has been given the discretionary power to grant bail in certain circumstances and, in the case of offences punishable with life imprisonment or death, for special reasons. The High Court, it would appear by s 394, has absolute power to grant bail. However this discretion is, as indicated earlier, only exercisable where no specific provision exists in the statute creating the offence. In our present case the provision for bail does exist. Section 41B has the effect of making the offence under the dangerous Drugs Act an absolutely unbailable offence.

Mr D'Cruz's next argument is that even if s 41B of the Dangerous Drugs ordinance has the effect of rendering the offence absolutely unbailable, the section was intended to restrict the discretionary power of bail by the Court having original jurisdiction only and in this case the sessions court and not the High Court. He made particular reference to the case of *Sulaiman bin Kadir v Public Prosecutor* [1976] 2 MLJ 37; [1975] 1 LNS 171*but I am unable to see how it could be of much assistance here. Perhaps counsel's intention is to illustrate from the orbiter of Harun J at p 38 to the effect that when a statute creates an offence it should also include provision for bail and that the power to grant bail should properly be conferred on the particular court given jurisdiction to try it. Both points, to mind, do not suggest the confinement of such power to the trial court only.*

It has also been urged upon me to adopt the course taken in the case of the *Che Su binte Daud v Public Prosecutor* [1978] MLJ 162*, where Gunn Chit Tuan J, apparently in exercise of the powers under ss 38 and 389 of the Criminal Procedure Code, admitted to bail an accused person charged under s 39B(2) of the Dangerous Drugs Act, an offence punishable with death or life imprisonment. Judgment in Che Su case was given barely four days after s 41B of the Dangerous Drugs Act came into effect. This and the obvious absence of reference to, or even any mention made of, s 41 by the learned judge in his judgment, points out strongly to the possibility that the matter was missed and was neither raised nor discussed by the parties before the learned judge. I am convinced that had the learned judge's attention been drawn to the provision of this newly enacted law, his decision would have been entirely different.*

I have had several occasions to look at s 41B of the Dangerous Drugs Act and it appears to me that the section contains not only express provisions which make the offence absolutely unbailable but also expresses in unequivocal language the intention of the legislature to restrict the judicial discretion as contained in the Criminal Procedure Code and other judge made laws. The expression 'notwithstanding any written law or any rule of law' to my mind, would include the provisions of the Criminal Procedure Code and also judge made laws or judicial precedents on bail. Section 41B of the Dangerous Drugs Act, being a particular subsequent legislation, must be construed as having curtailed the

discretion to grant bail in drug offences punishable with death or life imprisonment previously vested in the courts by an earlier general legislation, ie, the Criminal Procedure Code. When an Act enacts something in general items and afterwards another Act on a particular subject introduces in express terms special restriction on that subject, then the rule of construction demands that the provisions in the subsequent particular legislation should prevail and the provisions of the earlier legislation deemed curtailed or restricted to the extent of its inconsistency with the later legislation but not necessarily repealed.

The discretion as generally given by s 388, 389 & 394 of the Criminal Procedure Code has been effectively taken away from the Courts, both the subordinate and High Courts, by s 41B of the Dangerous Drugs Act. Disconcerting as it may be for us to witness the power of the Courts, both the Sub Dangerous Drugs Act. Disconcerting as it may be those relating to the liberty of the subject who is accused but yet to be proven guilty, being gradually whittled away by statute, yet when Parliament has expressed in unequivocal language its intention to curtail this discretionary power, the Courts are not free to question its wisdom in providing for a deterrent procedure for an obviously baneful mischief to society, but must interpret and give effect to the law as it stands.

The restriction on bail under s 41B of the Dangerous Drugs Act is absolute. Neither the Courts below, nor this Court, now possess the power to admit to bail any person charged thereunder with any offence punishable with death or more than five years' imprisonment, or even for lesser terms when the Public Prosecutor certifies that it is against public interest to allow bail.

The application for bail is therefore refused.

[65] His Lordship paid special attention to s 3 of the Criminal Procedure Code that 'All offence under the Penal Code shall be required into the tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into the tried according to the same provisions; subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences'.

[66] In *Loy Chin Hei* after referring to *Che Su binti Daud v Public Prosecutor* [1978] 2 MLJ 162 has this to say:

... it appears to me that the section contains not only express provisions which make the offence absolutely unbailable but also expresses in unequivocal language the intention of the legislature to restrict the judicial discretion as contained in the Criminal Procedure Code and other judge made laws. The expression 'notwithstanding any written law or any rule of law', to my mind, would include the provisions of the Criminal Procedure Code and also judge made laws or judicial precedents on bail.

[67] Further down the page, His Lordship said:

Where an Act enacts something in general terms and afterwards another Act on a particular subject introduces in express terms special restrictions on that subject, then the rule of construction demands that the provisions in the subsequent

A legislation should prevail and the provisions of the earlier legislation deemed curtailed or restricted to the extent of its inconsistency with the later legislation but not necessarily repealed.

B **[68]** His Lordship further said at p 33:

> The discretion as generally given by ss 388, 389 and 394 of the Criminal Procedure Code has been effectively taken away from the Courts, both the Subordinate and High Courts, by s 41B of the Dangerous Drugs Act. Disconcerting as it may be for us to witness the power of the Courts, especially those relating to the liberty of the subject who is Accused but yet to be proven guilty, being gradually whittled away by statute, yet when Parliament has expressed in unequivocal language its intention to curtail this discretionary power, the Courts are not free to question its wisdom in providing for a deterrent procedure for an obviously baneful mischief to society, but must interpret and give effect to the law as it stands.

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D **[69]** It has been submitted by the learned counsel for the applicant/accused that s 39C(1) of the Dangerous Drugs Act 1952 cannot be applied because he pleaded guilty not of his own volition.

E **[70]** This was answer by His Lordship Justice Wan Yahya in *Loy Chin Hei* when His Lordship remarked '*Disconcerting as it may be those relating to the liberty of the subject who is accused but yet to be proven guilty, being gradually whittled away by statute, yet when Parliament has* expressed in unequivocal language its *intention to curtail this discretionary power, the courts are not free to*

F *question its wisdom in providing for a deterrent procedure for an obviously baneful mischief to society, but must interpret and give effect to the law as it stands'.*

[71] Earlier in the judgment, His Lordship said, 'Section 41B of the

G Dangerous Drugs Act, being a particular subsequent legislation, must be construed as having curtailed the discretion to grant bail in drug offences punishable with death or life imprisonment previously vested in the Courts by an earlier general legislation, ie, the Criminal Procedure Code. When an Act enacts something in general items and afterwards another Act on a particular

H subject introduces in express terms special restriction on that subject, then the rule of construction demands that the provisions in the subsequent particular legislation should prevail and the provisions of the earlier legislation deemed curtailed or restricted to the extent of its inconsistency with the later legislation but not necessarily repealed'.

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[72] If we analyse all the authorities on bail particularly non-bailable offences, they do not talk of only the previous convictions but the current case for which bail is applied for by the accused person.

[73] I found no reason whatsoever to disagree with His Lordship Justice Wan Yahya. A

[74] For the sake of completion, the applicant was charged, pleaded guilty, convicted under s 15(1)(a) of the Dangerous Drugs Act 1952 and sentenced under s 39C Dangerous Drugs Act 1952. B

[75] In *Munawar Ahmad Anees v Public Prosecutor* [2009] 2 MLJ 1; [2009] 2 CLJ 42, the Federal Court ruled,

> [25] *Finally, it is noted that in dismissing the appeal the learned judge of the High Court had given due consideration to the fact that the appeal by the applicant was in relation to the applicant's conviction and sentence upon his own plea of guilt under s 305 of the CPC. Under the said provision of s 305 of the CPC the applicant cannot appeal against the conviction except as to the extent or legality of the sentence.* Having referred to the procedure and principles of law as laid down in the Supreme Court's case of *Lee Weng Tuck & Anor v Public Prosecutor* [1989] 2 MLJ 143; [1989] 2 CLJ 120; [1989] 1 CLJ Rep 75 the learned judge found that *the recording of the plea of guilt made by the applicant was in order and according to law. From the records of appeal available before him there was nothing to show that the proceedings before the Sessions Court where the applicant had pleaded guilty was conducted not in accordance with the procedure and principles laid down in Lee Weng Tuck's case.*

C D E

[76] In *R v Farinacci* [1993] WCBJ LEXIS 11345 the Ontario Court of Appeal (Canada) opined that after 'a conviction, there was no presumption left, one way or the other, but only an enforceable finding of guilt. The appellate process, which contained its own due process requirements, was not required to treat guilt as an open question. The notion of bail pending appeal was not perceived as resting on a presumption of innocence, even though the possibility that the appeal may ultimately lead to an acquittal was a prerequisite to any logical entitlement to bail. It could not be said that the entitlement to bail pending appeal should be the same as the entitlement to bail before trial, provided only that it be shown that an appeal was not frivolous ... Public confidence in the administration of justice required that judgments be enforced, and the public interest may require that a person convicted of a very serious offence, particularly a repeat offender advancing grounds of appeal that were arguable but weak, be denied bail'. F G H

[77] In *Giordano v R* (1982) 31 SASR 241 (Court of Criminal Appeal in South Australia) at p 242 Chief Justice King said this:

> *Before and during trial, the primary, although not the only, consideration is whether the applicant will appear when required to do so. This consideration has only a minor bearing on the grant of bail after conviction. Obviously bail after conviction would not be granted unless the circumstances were such as would have indicated bail before and during trial. After conviction, however, other cogent factors also came into consideration ... There are practical reasons, moreover, why courts should exercise extreme caution to the*

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grant of bail pending appeal. An appellate court does not sentence afresh in the light of circumstances which have changed since sentence was passed. It should not be placed in the invidious position, particularly of an appeal against sentence, of the dismissal of the appeal having the effect of returning to prison a person whose circumstances may have changed greatly during the period of liberty on bail pending appeal. There is a serious risk of availability of bail leading to a proliferation of unmeritorious appeals thereby adding to the strains on the system of justice. Persons undergoing punishment in custody are prone to seize any opportunity to secure release, perhaps leaving the future to take care of itself. Appeals would be launched, irrespective of the prospects of success, simply in order to secure release, or perhaps with a view to creating situations which would tend to frustrate justice by making it difficult to return the appellant to prison.

[78] The High Court of Australia in the case of *Hanson and Anor v The Director of Public Prosecutor (Queensland)* [2003] QCA 409 refused bail pending appeal since any finding based on the contention by the applicant that there were merits in her pending appeal against conviction and sentence would be premature without the benefit of full argument on the substantive appeal. It was also held that such contention did not 'demonstrate special or exceptional circumstances of the kind which would lead to a grant of bail' at that stage.

[79] In relation to period of waiting for appeal to be heard His Lordship, Justice Bokhary of the Hong Kong Court of Appeal in the case of *The Queen v Lee Hoi Kwong* [1993] HKCU 402 expressed a view that 'it is not to be supposed that bail pending appeal was inevitable or even highly likely in all cases of short sentences notwithstanding that the time before which an appeal can be determined may well approximate the length of the sentence concerned'.

[80] Accordingly based on the foregoing cases the principles of law expounded as guidelines in the exercise of discretion when considering an application for bail pending appeal may be briefly summarised thus:

(a) that the presumption of innocence is no longer a factor to consider;

(b) that the factors to consider differ from that of pre-conviction application for bail;

(c) that attendance in court is only a minor consideration;

(d) that the time lapse before the appeal can be determined in relation to the length of sentence imposed is a relevant factor. But there is no general rule to say that an applicant with short custodial sentence should be automatically given bail. In appropriate cases bail may be refused even if it means that the sentence will be served before the appeal is heard;

(e) that it is crucial for an applicant to show the presence of exceptional circumstances which would drive the court to conclude that justice can only be done if bail is granted;

(f) that where reliance is placed on proposed grounds of appeal, they must be prima facie very strong or extraordinarily high prospect of success;

(g) that public confidence in the administration of justice requires that judgment should be enforced, hence a person convicted of a serious offence, particularly a repeated offender, should be denied bail;

(h) that an appellate court should not be put in an awkward situation of having to return a convict upon dismissal of his appeal to prison to serve his sentence when his circumstances might have drastically changed while he is out on bail. Or he might have created a situation whereby it will be difficult to return him to prison upon dismissal of his appeal and thus frustrate justice; and

(i) that by making bail readily available after conviction it will encourage the proliferation of unmeritorious appeals.

[81] In *Re Kwan Wah Yip & Anor* [1954] 1 MLJ 146b at pp 147–148; [1954] 1 LNS 78:

> The Deputy Public Prosecutor cited certain English authorities with regard to the granting of bail in England pending appeal to the Court of Criminal Appeal, and it is quite clear that bail is only granted in England by that Court in exceptional circumstances. *I do not think, however, that quite the same considerations apply in regard to appeals from Subordinate Courts to the High Courts, so that I do not think these authorities are of much assistance in dealing with the question now before me.*
>
> *The considerations which I suggest should guide the Subordinate Courts in granting or refusing bail pending appeal in cases where a term of imprisonment has been imposed are the gravity or otherwise of the offence; the length of the term of imprisonment in comparison with the length of time which is likely to take for the appeal to be heard; whether there are difficult points of law involved; whether the accused is a first offender or has previous convictions; the possibility of his becoming again involved in similar or other offences whilst at liberty; and whether the security imposed will ensure the attendance of the applicant before the appellate court.* (Emphasis added.)

[82] Subsequent decisions of our courts reflected a similar approach. In *Sharma Kumari a/p Oam Parkash v Public Prosecutor* [2000] 6 MLJ 847; [2000] 1 LNS 123 the learned High Court judge expressed his view thus:

> a stay of execution should not be granted and will not be granted by me unless there are special reasons for so doing, and the mere fact that a notice of appeal has been given is no sufficient reason. The only other reason given in this case is that the applicant who has been advised verily believes she has good reasons for appeal. That, also in my view does not constitute grounds for releasing an applicant pending appeal.

[83] And in *Ganesan v Public Prosecutor* [1983] 2 MLJ 369; [1983] 1 CLJ 300; [1983] CLJ Rep 567, His Lordship Justice Dzaiddin (as he then was) said this at pp 368–369 (MLJ); pp 300–301 (CLJ); p 568 (CLJ Rep):

> However, it has been stated on numerous occasions that the consideration which should guide the subordinate courts in granting or refusing bail pending appeal in cases where a term of imprisonment has been imposed are as follows:
>
> (1) *gravity or otherwise of the offence*;
>
> (2) *the length of the term of imprisonment in comparison with the length of time which is likely to take for the appeal to be heard*;
>
> (3) *whether there are difficult points of law involved*;
>
> (4) *whether the accused is a first offender or has previous conviction*;
>
> (5) *whether the accused would become involved again in another offence whilst at liberty*; and
>
> (6) *whether the security imposed will ensure the attendance of the applicant before the appellate court.*

[84] In the case of *KWK (a child) v Public Prosecutor* [2003] 4 MLJ 479; [2003] 4 CLJ 51. And this is what the court said at p 487 (MLJ); pp 60–61 (CLJ):

> Bail in the case of persons awaiting trial and in the case of persons after their conviction entail different considerations ... As Barr J said in *R v Velevski* (2000) NSWCCA 445:
>
> > It has long been the common law (which is now excluded in this state by the Bail Act, s 67) that bail will not be granted to a person convicted of an offence pending the hearing of an appeal against his conviction unless special or exceptional circumstances are shown by him to exist. This is a recognition by the common law of the fact that the applicant for bail has already been tried and convicted and no longer has any presumption of innocence in his favour. The common law accepts that such conviction results from a trial which must be taken, until the contrary be shown, to have been properly conducted and without error of law; *R v Southgate* [1960] 78 WN (NSW) 44 at p 44. To grant bail pending an appeal from that conviction is to whittle away the finality of the jury's verdict and to invest it with a provisional quality, thus attacking the central feature in the administration of criminal justice: *Chamberlain v The Queen (No 1)* [1983] 153 CLR 514 at pp. 519-520. The common law sees strong social reasons why an applicant's hopes should not be raised by the grant of bail for, if unsuccessful in his appeal, he will suffer all the more when those hopes are dashed and he is returned to custody to serve the sentence previously imposed upon him: *R v Gruffydd* [1972] 56 Cr App R 585 at p 589. There are also practical reasons for the common law's view that bail should be less readily available after conviction. These were referred to by King CJ in *Giordano v R* (1982) 31 SASR 241 at p 242; 6 A Crim R 397 at Public Prosecutor 398–399,

and have been quoted by the Chief Justice in his judgment in the present application. A

[85] Section 57 of the Courts of Judicature Act 1964 provides that an appeal shall not operate as a stay of execution though the court has a discretion to grant a stay. As the grant of a stay is only an exception to the general rule there must be special or exceptional circumstances before the discretion can be exercised in favour of an applicant. B

[86] In commenting on proof of special circumstances Justices Murray, Brooking and Vincent said in *Re Clarkson* [1986] VR 583 at pp 584–585: C

> *In our view there is no difference between the approach of those who have spoken in terms of very exceptional circumstances and those who have referred only to special or exceptional circumstances. If the principle that special or exceptional circumstances must be shown to warrant admitting a prisoner to bail pending appeal is regarded as meaning only that the applicant bears a burden and must put forward, as justifying the grant of bail, something that is not present in most or all cases, then the statement of principle has failed adequately to convey the practice of the court and the principle on which it acts. It is probably for this reason that judges have on occasions expressed the requirement as one of 'very' exceptional circumstances. The adverb reflects the difficulty of persuading the court that the circumstances put forward as special or exceptional are strong enough to overcome the powerful considerations of a general character which militate against the grant of bail pending appeal. So strong are these considerations that it has been said that extreme caution must be exercised before bail is granted: Giordano v R* (1982) 31 SASR 241; *Re Maher (unreported, Full Court of Queensland, 18 November 1985). Indeed in England the Court of Appeal has gone so far as to say that the application will succeed only if the court is driven to the conclusion that justice can only be done by the granting of bail: R v Watton* [1978] 68 Cr App R 293*, at p 297. The powerful considerations, relating principally, but not exclusively, to the public interest, which will ordinarily induce the court to refuse bail pending appeal have been examined in recent pronouncements of the Full Courts of South Australia and Queensland in Giordano's case and Maher 's case and by Brennan J in Chamberlain v R (No 1)* [1983] 153 CLR 514; 46 ALR 608*, see further the observations of Sugarman J in R v Southgate* [1961] 78 WN (NSW) 44*, where his honour referred to the applicant's guilt as established by the verdict of a jury in what must be taken, until the contrary was shown, to have been a trial properly conducted and without error of law.* D E F G H

[87] The factors that may constitute special circumstances to justify the grant of a stay of execution after conviction are well settled (see, for example, *Ganesan v Public Prosecutor* [1983] 2 MLJ 369; [1983] 1 CLJ 300; [1983] CLJ Rep 567; *Yusof bin Mohamed v Public Prosecutor* [1995] 3 MLJ 66; *Ralph v Public Prosecutor* [1972] 1 MLJ 242). They can be enumerated as follows: I

(a) the gravity or otherwise of the offence;

(b) the length of the term of imprisonment; in comparison with the length of time which is likely to take for the appeal to be heard;

A (c) whether there are difficult points of law involved;

(d) whether the accused is a first offender or has previous convictions;

(e) whether the accused would become involved again in another offence whilst at liberty; and

B (f) whether the security imposed will ensure the attendance of the applicant before the appellate court.

This list is not exhaustive (see *Goh Beow Yam v Reg* [1956] 1 MLJ 251).

C **[88]** The function of the court in interpreting the law was discussed in *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685; [2005] 2 AMR 353 where the Federal Court has this to say, inter alia:

D *The primary duty of the court is to give effect to the intention of the Legislature in the words used by it. It is a well established canon of interpretation that the intent of the legislature is to be gathered from the words used and that if the words used have not acquired any technical meaning, they should be deemed to have been used in their ordinary meaning. If the words of the statute are in themselves precise and unambiguous, then no more is necessary than to expound those words in their natural and ordinary sense. The words themselves alone in such cases best declare the intent of the law giver.*

E

[89] The strenuous invitation by the learned counsel for the applicant/accused to grant a stay of execution of the sentence which in essence is granting bail to the applicant/accused is met with a brick wall because s 41B of the Dangerous Drugs Act 1952 makes the offences thereunder as unbailable

F offence and not a mere non bailable offence.

CONCLUSION

G **[90]** This court, after having considered the relevant statutory provisions and the authorities, finds no merit in this application and I dismissed the notice of motion pursuant to encl 1.

[91] The decision that I am making in this application, is entirely for this

H application and does not influence my evaluation in any way, for the appeal or any other matter arising from this case

Notice of motion dismissed.

Reported by K Selvaraju

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